No. 86-1813

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

V.L. COOPER, ET AL., PETITIONERS

V.

FRANK K. KOTARSKI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT	2
REASONS FOR DENYING THE PETITION	3
CONCLUSION	13

TABLE OF AUTHORITIES

CASES CITED

Bush v. Lucas, 103 S. CT. 2404 (1983)	5,6
Davis v. Passman, 442 U.S. 228 (1979)	12

CONSTITUTION

Fifth Amendment	10

STATUTES

Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 ...	8

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OPINIONS BELOW

The opinions of the Court of Appeals and the District Court are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Whether a probationary federal employee, for whom the civil service system offers no meaningful remedies for redress of alleged constitutional injury, may bring a Bivens action against his superiors seeking money damages. Whether a probationary employee may challenge the constitutionality of the statutes and regulations dealing with his probationary status.

STATEMENT

The facts of the case are adequately stated in the decision by the Ninth Circuit Court of Appeals (Petitioners Appendix A, at 1A - 16A).

REASONS FOR DENYING THE PETITION

The petition for a writ of certiorari should be denied as the Court of Appeals correctly decided the issues in the case and the result of that decision was fair and just. The decision reached was also consistent with the Constitution and Supreme Court precedent.

The matter before the Court does not address the factual issues of respondent's case. It deals with the issue of whether or not respondent will ever be able to present his case. Respondent has alleged violations of his constitutional rights and seeks to enforce those rights in a court of law. Petitioners are arguing that respondent can pursue only the remedies provided by Congress and that the courts should defer to Congress on matters affecting the federal employer-employee relationship.

The constitutional implications of adopting the petitioners position are enormous. The rights guaranteed to the citizens of this country by the Constitution imply a means to enforce those rights. A right that provides no enforcement mechanism becomes a mere expectation. Its viability is dependent on the disposition of individuals rather than the demands of law.

If respondent, as a probationary employee, has no meaningful remedies to pursue for constitutional injury, then he has no constitutional rights during that status. If Congress can except probationary employees from the guarantees of the Constitution, as petitioners claim, it then has the authority to exclude all federal employees. Constitutional rights should not attach in varying degrees dependent on one's job status. They apply uniformly to the citizens of this country.

Congress either has the authority to alter those rights or it does not. If Congress does, then it can merely redefine the status of any federal employee or limit the remedies available based on its perception of governmental need.

Petitioners reliance on the Bush v. Lucas decision to support its position neglects to examine the context surrounding that decision. Respondent's review of that case yields a much different finding than petitioner's. The Court in Bush, while denying a Bivens remedy to the federal employee seeking it, recognized the requirement for a meaningful, constitutionally adequate remedial system for redress of constitutional injury. When that standard is met by Congress, in a comprehensive remedial scheme, the Court will not fashion a new judicial remedy. But the real test is whether the system established meets the threshold requirements of the

Constitution not the fact that Congress created it. The courts should not defer to Congress as proposed by petitioners but must examine if the remedies provided allow meaningful protection of constitutional rights. Congress can provide alternative remedies. It, however, is bound by the Constitution and cannot create a system that effectively eliminates any meaningful remedy.

The Court recognized the issue in Bush v. Lucas, 103 S.CT. 2404 (1983) by stating:

> We need not reach the question whether the Constitution itself requires a judicially-fashioned damages remedy in the absence of any other remedy to vindicate the underlying right, unless there is an express textual command to the contrary. ..... The existing civil service remedies for a demotion in retaliation for protected speech are clearly constitutionally adequate. Id., at 2411, (footnote 14)

Petitioners claim that Congress established the Office of Special Counsel to protect employees' constitutional rights but that is again not the test proclaimed in Bush v. Lucas. The remedy provided must

be constitutionally adequate. Petitioners own description of the Special Counsel's activities uses terms such as "may recommend corrective action" or "may initiate a proceeding". Their functions are entirely discretionary.

The Office of Special Counsel also conducts its business in a manner that excludes the complaining party from participating in the process at all. Throughout the Special Counsel's investigation, respondent was offered no opportunity to question witnesses, review testimony or rebut evidence. He was not even made aware of the material that was being offered. Respondent was given a bare finding by the Office of Special Counsel with no supporting documentation. It would greatly stretch the boundaries of legal rationalization to hold such a system is meaningful and constitutionally adequate.

Petitioners argue that allowing a Bivens action in this case will have major ramifications for the federal government. They claim that it will open the door to costly and expensive litigation by more than 364,000 federal employees with limited remedies under the Civil Service Reform Act. They point out that minor personnel actions, such as 15 day suspensions, may be challenged by allegations of unconstitutional actions.

What petitioners do not present is the fact that respondent is the only probationary employee ever removed from his position at the Naval Air Rework Facility. This Naval Command had a workforce of over 5000 civilian employees. They fail to mention that, for the overwhelming majority of people, litigating any dispute is highly stressful, extremely expensive, time consuming and to be avoided if at all possible. The flood of nuisance lawsuits,

envisioned by petitioners, is more likely to be limited, responsible attempts to redress perceived constitutional injury.

Petitioners argue further about the in terrorem effect on supervisors and how it will hinder the efficient management of the Civil Service. Petitioners are mistaken when they propose that the best interests of the supervisors or management are synonymous with the best interests of government. A government that must function by infringing on the most basic rights of its employees is wrongly defining its interests with the self-interests of those in positions of authority. There is no serious rationale that can be advanced to support the proposition that supervisors must be free, at times, to violate the constitutional rights of probationary employees if the government is to operate properly. The ability to perform the most serious constitutional misdeeds without

fear of any consequence will have a more serious in terrorem effect on all federal employees.

The Court of Appeals decision allows the constitutional issues raised by respondent to be contested in a trial, nothing more. Respondent still has a heavy burden to prove his case. If petitioners demonstrate that the motives for their actions are as claimed, respondent cannot win. If petitioners can show their ample documentation is a true recounting of the events, respondent cannot win. If, however, constitutional rights were violated and materials fabricated to obscure that fact, then respondent must have the opportunity to present those issues in a court of law.

Respondent has also challenged the constitutionality of the laws and regulations applicable to probationary employees as violative of 5th Amendment due

process of law guarantees. The current regulations require sufficient cause to justify removing a probationary employee from his position but allow no challenge to the legitimacy of the reasons that are offered for the removal. The removal and the reasons advanced as justification must be shown on each subsequent job application that is submitted within the federal government. The severity of the justification and the rarity of the event effectively precludes a removed probationary employee from career advancement or mobility within the federal government. The violation of property and liberty interests is a valid constitutional issue that should not be summarily dismissed. Presentation of these issues with a full exploration of the facts, at trial, must be allowed.

The Supreme Court has consistently supported the enforcement of constitutional rights by individuals in a court of law

where that is the only available means to preserve those rights. The Court in Davis v. Passman, 442 U.S. 228, at 242 (1979) stated:

> And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights

If there is a permanent solution to the issues presented by this case it is the responsibility of Congress to provide it. Congress can include probationary employees within the present remedial system for allegations of constitutional injury. This would effectively preclude a Bivens action, in the circumstances of this case, by providing a constitutionally adequate, alternative remedy.

Respondent recognizes the division in the circuits regarding this subject matter but believes the decision rendered by the Ninth Circuit Court of Appeals to be just, fair and correctly comports with applicable law and precedent. He respectfully requests the Court to deny certiorari.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted

Frank K. Kotarski
Respondent